SUPREME COURT OF WISCONSIN

MAYA ELAINE SMITH

Plaintiff,

vs.

Appeal No. 2015AP000079
Circuit Court Case No. 2013CV007085

JEFF ANDERSON, d/b/a
ANDERSON REAL ESTATE SERVICES

Defendant, Third-Party Plaintiff,

vs.

4TH DIMENSION DESIGN, INC.

Third-Party Defendant,

R&B CONSTRUCTION, INC.

Third-Party Defendant-Appellant-Petitioner,

WEST BEND MUTUAL INSURANCE COMPANY

Intervenor-Respondent.

ON APPEAL FROM A DECEMBER 22, 2015, DECISION OF
THE COURT OF APPEALS DISTRICT I, AFFIRMING A SUMMARY
JUDGMENT OF THE MILWAUKEE COUNTY CIRCUIT COURT
THE HONORABLE PEDRO A. COLON PRESIDING

FIRST BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT-PETITIONER R&B CONSTRUCTION, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page**

Statutes Cited

SUMMARY

This is an appeal of a summary judgment declaring that an insurance company has no duty to defend its insured with respect to a third-party complaint brought against the insured by a defendant who was sued for misrepresentation.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

This case presents significant issues regarding an insurer's duty to defend its insured, and R&B requests both oral argument and publication.

ISSUES FOR REVIEW

1. Can a third-party complaint state a claim that an insurance company has a duty to defend, where the complaint against the third-party plaintiff is for misrepresentation?

Answered by the Circuit Court: No.

Answered by the Court of Appeals: No.

2. Should a party looking to his insurance company to provide him with a defense be able to

introduce information not stated in the pleadings to show that there could be claims requiring his insurer to provide a defense?

Answered by the Circuit Court: No.

Answered by the Court of Appeals: No.

3. Can a party denied a defense after his insurance company succeeds on a motion for summary judgment reassert a right to a defense if later developments in the case show that he is entitled to a defense?

Answered by the Circuit Court: Not Answered.

Answered by the Court of Appeals: Not Answered.

STATEMENT OF THE CASE

Nature of the Case. The third-party defendant-appellant-petitioner, R&B Construction Inc. ("R&B") asks the Supreme Court to review and reverse the December 22, 2015 decision of the Court of Appeals, and the Circuit Court's summary judgment

determination which it affirmed. The Circuit Court decided that R&B's insurer, the intervenor-respondent West Bend Mutual Insurance Company ("West Bend"), had no duty to defend R&B when the defendant Jeff Anderson d/b/a Anderson Real Estate Services ("Anderson") filed a third-party complaint against R&B.

Initially, the plaintiff Maya Smith ("Smith") sued Anderson for misrepresenting the condition of a house that he sold to her. Smith claimed that the drain tiles in the house were plugged with iron ochre and that the basement leaked. Anderson then filed and served a third-party complaint against R&B and an engineering firm, alleging that they had performed work on the house before it was sold and claiming that they should be responsible for the damages claimed by Smith. R&B denied all claims against it and tendered defense of the action to its insurer, West Bend. West Bend intervened in the action and immediately sought and obtained summary judgment that it had no duty

to defend R&B. The Court of Appeals affirmed the summary judgment.

The Court of Appeals approached the case from the perspective that the claims made by Smith (against Anderson) were for misrepresentation, and citing *Qualman v. Bruckmoser*, 163 Wis.2d 361, 366, 471 N.W.2d 282 (Ct.App.1991) concluded that claims of misrepresentation are claims for pecuniary loss (of the sort addressed in *Bruckmoser*), are not covered by insurance and do not give rise to a duty to defend. However, R&B was not being sued for misrepresentation and Smith was not just claiming for pecuniary loss. She also claimed for the costs of repairing, replacing and adding drain tile as damages.

R&B had asked the Court of Appeals to consider that the Circuit Court ruled at a later motion hearing that the pleadings stated a claim of negligence against R&B — a claim that R&B might have caused or contributed to the damage claimed by the plaintiff, which was leakage and clogging of drain tile, when

R&B added supports to the basement walls of the house. West Bend should have been required to defend R&B if the complaint against R&B arguably includes a claim of negligence of the sort described by the Circuit Court. The Court of Appeals declined to compare and did not discuss the Circuit Court's later ruling on R&B's motion to dismiss the third-party complaint.

Procedural Status of the Case. This case is before the Court on the Court's order granting R&B's Petition for Review of the December 22, 2015 decision of the Court of Appeals. The Court of Appeals affirmed the Circuit Court's summary judgment declaring that West Bend had no duty to defend R&B.

The defendant and third-party plaintiff Anderson sold the plaintiff Smith a house located at 3034 North 91st Street, Milwaukee, Wisconsin (the "house"). On August 2, 2013, Smith sued Anderson for misrepresenting the condition of the house. [R.11,

App., pp.60-67[1]] Smith alleged that after buying the house, she discovered that the drain tiles were plugged with iron ochre and that the basement leaked. [R.11,¶5, App., p.63]

Smith did not file any claims against R&B in either her Complaint or Amended Complaint[2], and has nowhere claimed that R&B made any misrepresentations or that R&B's work was defective.

On January 2, 2014, the defendant Anderson filed a third party complaint against 4th Dimension Design, Inc. ("4th Dimension"), an engineering firm, and R&B, alleging that Anderson was entitled to indemnification and contribution. [R.11, App., pp.55-67]

R&B tendered the third-party complaint to its insurer, West Bend. West Bend engaged counsel and

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[1]The complaint is attached to the third party summons and complaint, served on R&B [R.11,App., pp.60-67].

[2] Smith filed an amended complaint on January 27, 2014. [R.16, App., pp.68-73] Anderson filed an answer to the amended complaint on February 13, 2014. [R.18]

answered the third party complaint for R&B on February 17, 2014. [R.20,App.,pp.74-75] On February 21, 2014, West Bend filed a motion to intervene and to bifurcate and stay the proceedings. [R.21 With its motion it filed a proposed intervenor complaint seeking a declaratory judgment that there was no coverage under its policy and that it had no duty to defend R&B. [R.23,App.,pp 76-128] The Circuit Court granted West Bend's motions for intervention and a stay on April 28, 2014. A written order was entered on May 27, 2014. [R.26,App.,pp.129-130]

R&B retained separate counsel and on June 18, 2014, filed an answer contesting West Bend's intervenor complaint and a counterclaim asserting that West Bend was obliged to defend R&B. [R.30, App., pp.131-133] West Bend answered and denied R&B's counterclaim on July 3, 2014. [R.31]

On August 6, 2014, West Bend moved for summary judgment against R&B, filing a motion,

brief, and affidavit. [R.32; R.33; R.34, App.,pp.134-161] West Bend sought a declaratory judgment that its policy did not provide coverage and that it had no duty to defend R&B. R&B responded with a brief and affidavit on September 26, 2014. [R.37; R.38, App., pp.162-164] West Bend filed a reply brief on October 20, 2014. [R.40] On November 4, 2014, the Circuit Court heard oral argument and granted West Bend's motion in a ruling from the bench. [R.64, pp.23-25, App.,pp.29-31]

On November 13, 2014, R&B filed a motion for summary judgment and/or judgment on the pleadings seeking dismissal of the third party complaint against it and a motion for an order staying entry of the judgment in favor of West Bend pending the Circuit Court's decision on R&B's own motion for dismissal. [R.42; R.43; R.44] R&B's motion for the stay was *defacto* denied when on November 25, 2014, the Circuit Court signed and filed a final judgment submitted by West Bend. [R.48] West Bend filed a

notice of entry of judgment on December 8, 2014, which shortened R&B's time for appeal. [R.49]

On January 8, 2015, the Circuit Court heard and denied R&B's motion for summary judgment seeking dismissal of the claims against it [R.65,pp.17-18, App.,pp.51-52] After the January 8, 2015 hearing, R&B filed a timely Notice of Appeal as to the final judgment entered in favor of West Bend on November 25, 2014. [R.62]

The Circuit Court entered a written order denying R&B's motion for summary judgment on January 27, 2015. [R 61] R&B filed a timely petition for leave to file an interlocutory appeal of the Circuit Court's denial of its own motion for summary judgment (seeking dismissal of Anderson's claims against it) on February 10, 2015. By this petition, R&B asked the Court of Appeals to review the Circuit Court's rulings on West Bend's motion and R&B's motion at the same time. However, the Court of Appeals denied R&B's petition for leave to file an

interlocutory appeal on March 12, 2015 (in Case No. 2015AP276-LV). [App.,pp.33-34]

On May 22, 2015, West Bend moved the Circuit Court for a stay of all proceedings pending the Court of Appeals' decision regarding coverage. The Circuit Court granted West Bend's motion on May 27, 2015, and proceedings before the Circuit Court have been held in abeyance since that time.

On December 22, 2015, the Court of Appeals issued its decision affirming the Circuit Court's dismissal of West Bend. In footnote 2 of its decision, the Court of Appeals noted that the issue of whether the circuit court erroneously denied R&B's motion for summary judgment "is not before us."

STATEMENT OF FACTS

The Court of Appeals stated that it was applying the "four corners" rule as follows:

> An insurer's duty to defend is "determined by comparing the allegations of the complaint to the terms of the insurance policy." *Smith v. Katz*, 226 Wis.2d 798, 806, 595 N.W.2d 345 (1999). The duty to defend is predicated on allegations in a complaint which, if proven

> true, would give rise to the possibility of recovery that falls under the terms and conditions of the policy. *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp*., 2003 WI 33, ¶19, 261 Wis.2d 4, 660 N.W.2d 666. The duty to defend is based solely on the allegations within the complaint's four corners without resorting to extrinsic facts or evidence, and focuses only on the nature of the claim, not its merits. *Smith*, 226 Wis.2d at 806. "The insurer's duty arises when the allegations in the complaint coincide with the coverage provided by the policy." *Id*. at 807.

With reference to the "four corners" rule, the facts are as follows:

Facts Stated in the Complaint. According to her complaint, Smith discovered that the drain tiles were plugged with iron ochre and that the basement leaked after she bought the house at issue. [R.11, ¶5, App.,p.63] Smith contended that Anderson misled her when he sold her the house. She sued Anderson, pleading causes of action for intentional misrepresentation, violation of §§ 895.446 and 943.20(1)(d) Stats. (by false representations) and violation of §100.18 (by untrue, deceptive and misleading representations). She asserted a cause of action for breach of contract, where the claimed

breach is that Anderson failed to disclose adverse conditions affecting the house in his real estate condition report.

Smith did not file any claims against R&B in either her Complaint or her later Amended Complaint, and never claimed that R&B made any misrepresentations or that R&B's work was defective.

In her Complaint, Smith claimed in the alternative for property damage and pecuniary damages. R&B disagrees with the Court of Appeals where it stated:

> Like in *Qualman*, the pleadings here do not allege property damage or loss of property use. The pleadings alleged "pecuniary damages" and requested "[rescission of] the sale, return [of] all moneys paid by the plaintiff in purchasing and improving the property, plus moving costs and other expenses related to the purchase of the property."

In the fact allegations of her complaint Smith alleged at ¶7: "That in order to repair or correct the condition of the property she will need to replace the drain tile

and install drain tile."[3] [R.11, App.,p.63] In her "wherefore" clause Smith asked for "the cost of placing the property in the condition that it was represented to be in" and "the cost of all repairs." [R.11, App.,p.66][4] Anderson in turn seeks to recover these damages from R&B.

Facts Stated in the Third-Party Complaint.

Anderson denied Smith's complaint and filed a third party complaint against an engineering firm, 4th Dimension Design, Inc. ("4th Dimension"), and R&B. By filing his third-party complaint, Anderson sought to recover the damages claimed by Smith from R&B and 4th Dimension.

In his third party complaint, Anderson alleged that he hired 4th Dimension to perform an inspection

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[3]The Amended Complaint added the allegation, at ¶5, that Anderson performed structural repair work without obtaining the required permits, and, at ¶7, that to repair or correct the condition of the property, Smith will need to obtain the proper permits. [R.16,p.2, App.,p.69]

[4]The Court of Appeals only quoted from the "Additional Remedy Restitution/Recission" section of the complaint, found on the same page.

and assessment of the basement wall structure for the basement at 3034 N. 91st and to make recommendations as to any repairs and reinforcement, if any, that may be required to repair any defects, if any, that existed in the basement walls and foundation. [R.11,p.2,¶4, App.,p.56] 4th Dimension inspected the house, prepared a report and provided a detailed plan for reinforcing the basement walls. [R.11,p.2,¶5, App.,p.56] Anderson then directed R&B to perform repairs in accord with the report and drawings provided by 4th Dimension, and R&B did so "in accord with the design drawings." [R.11,p.2,¶¶6-7, App.,p.56]

Anderson alleges that "in addition thereto" he hired R&B, to address potential water seepage along the east wall of the basement. Anderson alleges that R&B did an inspection and observed that the east wall of the basement was subject to a descending grade and was subject to potential water run-off draining in the direction of the east wall of the property. [R.11,p.2,¶8,

App.,p.56] Anderson also alleges that at R&B's recommendation, he directed R&B to install drain tiles along the base of the east wall in the basement floor and a sump crock and sump pump in the northeast corner. [R.11,p.3,¶9, App.,p.57] Anderson then alleges that R&B "properly installed" the new drain tile system, sump crock and sump pump and made certain that said system was in good working order and draining to the proper area of the property.[R.11,p.3,¶10, App.,p.57]

Anderson attached a copy of Smith's complaint to his third-party complaint. Anderson alleged "[w]ithout admitting that any of the work performed by [R&B] and/or [4th Dimension] was faulty, negligent, or defective, this defendant alleges that if this defendant is liable that he is entitled to be indemnified and held harmless..." [R.11,p.3,¶12, App.,p.57]

Notwithstanding that Anderson specifically claimed that 4th Dimension and R&B were liable to

him for indemnification and contribution, the Court of Appeals concluded:

> There is no contention that R & B's faulty workmanship caused the water exposure or the multiple issues that resulted therefrom. Indeed, the third-party complaint states that R & B's work was "performed in accord with the design drawings prepared by ... 4th Dimension Design, Inc.[,]" and was "properly installed."

While R&B would agree that based on these allegations, it should never have been made a party to this lawsuit, the Circuit Court would not dismiss R&B. The Circuit Court concluded (on R&B's motions for summary judgment and judgment on the pleadings) that the third-party complaint stated a potential claim of negligence on the part of R&B.

Facts Submitted by Affidavit. When West Bend moved for summary judgment, the owner of R&B, Bruce Klamrowski ("Klamrowski") submitted an affidavit in which he agreed that per Anderson's instructions, R&B performed structural reinforcement of the basement walls of the house following the plans provided by 4th Dimension, the engineer hired by

Anderson. [R.38,p.2 ¶3, App.,p.163] Klamrowski also stated that at Anderson's instructions, R&B installed a sump crock, and replaced approximately four feet of interior drain tile along the east wall leading to the sump crock. However, there was over 120 feet of drain tile in the house that R&B had nothing to do with. [R.38,p.2,¶5, App.,p.163] Klamrowski also stated that other people hired by Anderson worked on the house, including the basement and foundation, and that Anderson, or others working at his direction, installed the sump pump itself,[5] installed the piping which directed water from the sump pump crock to the exterior of the house, performed work on the sewer laterals leading to the house, did grading work around the foundation, as well as other work. [R.38,p.2,¶4, App.,p.163]

[5]Although the third party complaint alleges that R&B installed the sump pump, in an affidavit filed in connection with R&B's summary judgment motion, Anderson agreed that R&B did not perform this work. [R.51,p.4,¶11]

West Bend's Insurance Policy. As stated by the Court of Appeals, West Bend's policy generally provided liability coverage for property damage caused by an "occurrence" as follows:

> This insurance applies to ... "property damage" only if: ... "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
> ....
>
> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
> ....
>
> "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

This is standard language in a CGL policy. It is the exact language at issue in the *American Family Mutual Ins. Co. v. American Girl, Inc.,* 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65, and subsequent cases.

R&B's policy required West Bend to defend against any suit that seeks bodily injury or property damage from R&B:

> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and *duty to defend the insured against any suit seeking those damages*. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" for "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> (1) The amount people pay for damages is limited as described in Section III – Limits of Insurance; and
>
> (2) Our right and duty to defend ends when we have used up the applicable limit of insurance...

[emphasis added] Again, this is standard language which has been addressed numerous times on appeal. This Court has interpreted this language such that the duty to defend is significantly more broad than the duty to indemnify. *Se. Wisconsin Prof'l Baseball Park*

Dist. v. Mitsubishi Heavy Indus. Am., Inc., 2007 WI App 185, 304 Wis. 2d 637, 675, 738 N.W.2d 87, 106; *Radke v. Fireman's Fund Ins. Co.*, 217 Wis.2d 39, 47, 577 N.W.2d 366 (Ct.App.1998).

DISPOSITION BY THE CIRCUIT COURT

The Circuit Court decided West Bend's motion for summary judgment from the bench as follows:

> I'm going to grant the summary judgment on the issue of coverage. I just don't see what the occurrence is based on my review of all the allegations in the complaint and the amended complaint and third party complaint. Additionally, you know, the third party complaint does not include any requests for property repairs or property damage. Third party complaint simply doesn't describe any occurrence as it is defined in the policy and it just seeks to affirmatively require that R&B performed all repairs and work properly. And that by itself doesn't constitute an occurrence.[6]

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[6]The Circuit Court also referred to an exclusion, stating: "In addition, there's that exclusion. And it's the insurance policy does not apply, quote, if the property damage – – that particular part of the real property which you or any contractors or subcontractors working directly or indirectly on your behalf are performing the operations if the, quote, property damage arises out of the operations or in that particular part of the property that must be restored, repaired, or replaced because of, quote, your work was performed – – incorrectly performed on it. End of quote." The trial court did not elaborate. Although the parties argued the applicability of this policy exclusion on

....

> I just don't – – I can't get over the fact that there isn't a theory for liability that affirmatively engages the policy to an extent that they would have a duty to defend. Now I know this is – – And I understand your point and I'm not glossing over it. I understand that this is sort of like the chicken and the egg argument or as I stated before, facts chasing the theory. And I can see your point, but I just don't think that's enough to overcome what the pleadings indicate. That is – – And as you indicated, maybe this question is right for a summary judgment motion. This is obviously not the appropriate time to review that, but I don't know. I think at some point all of the parties will have to get together and affirmative – – direct this court as to what the theory of liability is and then we can get to that point but I just don't think today I can get to that.

[R.64, pp.23-25, App.,pp.29-31]

In R&B's view, the Circuit Court's duty to defend decision was entirely inconsistent with its later decision made from the bench when it denied R&B's motion for summary judgment. There the Circuit Court stated that the pleadings raised an issue as to whether the work performed by R&B, although not

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appeal, the Court of Appeals did not address the exclusion after determining that there was no "occurrence" or "property damage." [Decision, footnote 2]

defective in itself, might have been a cause of the leakage into the basement.

The Circuit Court first stated [R.65,pp.16-17, App.,pp.50-51]:

> You know, there's -- I've reviewed -- If you look at Jendusa and his report,[7] there appears to be -- assuming that the standards are those of Wisconsin Association of Foundation Repair Professionals. According to him, there's some deviations which are significant in the design by 4-D of the basement walls. Now I'm not concluding that that is in fact the standard or that in fact their deviation, if there is one, would contribute to the condition of this faulty leaky basement. But it is a disputed fact.

The Circuit Court then suggested [R.65,pp.17-19, App.,pp.51-53] that even though R&B followed the exact specifications prepared by the engineering firm and furnished to him by Anderson, there could be an issue as to whether some negligence on the part of R&B caused the damage claimed by the plaintiff:

> So with the evidence before the court, there's – and taking all inferences in favor of the defendant, I can't find that there's not a

[7]The report which the Circuit Court refers to was prepared by' Smith's expert, and was made part of the record by Anderson in response to R&B's motion for summary judgment. [R.52,pp.6-9]

> dispute of material fact. I think there is a dispute of material fact and the allocation of responsibility within or – negligence within which is allocated, I am not sure about this juncture nor do I have to decide.
>
> .... I don't know that we have the facts today. But I wonder whether R&B shares responsibility, but we'll find that out through discovery I suspect.

When the Circuit Court denied R&B's motion for summary judgment, it had before it the exact same Complaint, Amended Complaint, and Third-Party Complaint it addressed when it dismissed West Bend.

DISPOSITION BY THE COURT OF APPEALS

The Court of Appeals decided that there was no insured "occurrence" or "property damage":

> ¶13 In examining the terms of the policy along with the allegations in the amended complaint and the third-party complaint, we conclude that none of the allegations can be construed as "occurrences" under the policy definition, even under the most liberal rules of pleading.

The Court explained its conclusion as follows:

> ¶14... Our review of Smith's complaint shows that the causes of action are for various forms of misrepresentation that allegedly occurred when Anderson sold the property to Smith. The misrepresentations concern physical defects with the home;

> however, the damages alleged are "pecuniary in nature and do not constitute property damage." See *Qualman v. Bruckmoser*, 163 Wis.2d 361, 366, 471 N.W.2d 282 (Ct.App.1991)

The Court appeared to view *Qualman* as dispositive:

> ¶16... Like in *Qualman*, the pleadings here do not allege property damage or loss of property use. The pleadings alleged "pecuniary damages" and requested "[rescission of] the sale, return [of] all moneys paid by the plaintiff in purchasing and improving the property, plus moving costs and other expenses related to the purchase of the property." Like in *Qualman*, the underlying facts in the pleadings deal with defects in the property, but the nature of the claims are based in contract and misrepresentation. Smith does not allege that the breach of contract or misrepresentations caused damage to the property, or a loss of property use. Smith claims she suffered economic losses because of the misrepresentation. Misrepresentations do not constitute property damage.

The Court of Appeals then added:

> ¶17 Moreover, the third-party complaint states no theory of liability against R & B. It simply states that if Anderson is found liable to Smith, R & B should share liability. There is no contention that R & B's faulty workmanship caused the water exposure or the multiple issues that resulted therefrom. Indeed, the third-party complaint states that R & B's work was "performed in accord with the design drawings prepared by ... 4th Dimension Design, Inc.[,]" and was "properly installed." Neither complaint states

> a claim for which West Bend agreed to indemnify.

The Court of Appeals did not address the Circuit Court's determination (underlying its denial of R&B's motion for summary judgment) that the third-party complaint sufficiently pleads a claim that something that R&B did in the course of its reinforcing the basement walls of the house caused or contributed to the leakage and plugging of the drain tiles of the house. The Court of Appeals stated (in footnote 2): "To the extent R&B argues that the circuit court erroneously denied its motion for summary judgment, we conclude that this issue is not before us."

STANDARD OF REVIEW

An appellate court reviews a summary judgment applying the same standards and methods used by the circuit court. *Frost ex rel. Anderson v. Whitbeck*, 2002 WI 129, ¶ 4, 257 Wis. 2d 80, 84, 654 N.W.2d 225, 227. Cases involving the interpretation of an insurance contract present a question of law which the court reviews *de novo*. *Am. Family Mut. Ins. Co. v. Am. Girl,*

Inc., 2004 WI 2, ¶ 23, 268 Wis. 2d 16, 32, 673 N.W.2d 65, 73 *("American Girl").* The proper application of the four-corners rule presents a question of law, which the Court decides independently of the determinations rendered by the circuit court and the court of appeals. *Olson v. Farrar*, 2012 WI 3, ¶ 22, 338 Wis. 2d 215, 226-27, 809 N.W.2d 1, 77, citing *Estate of Sustache v. American Family Mut. Ins. Co.*, 2008 WI 87, ¶¶ 27–29, 311 Wis.2d 548, 751 N.W.2d 845.

ARGUMENT

Wisconsin law permits an insurance company to obtain a stay of all proceedings so that it can obtain a ruling on whether or not it needs to defend its insured. *Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 836, 501 N.W.2d 1, 6 (1993); *Elliott v. Donahue*, 169 Wis. 2d 310, 318, 485 N.W.2d 403, 406 (1992). As was the case here, this typically happens at the beginning of the case, before expense is incurred on discovery and other proceedings.

Recognizing that there are handicaps in discerning the issues in a case at the pleading stage, the Supreme Court has created rules designed to make certain that a party who has purchased insurance is not prejudiced by this procedure. The Court has ruled that if any one claim arguably falls within the policy coverage, regardless of the merits of the claim, the insurance company has a duty to provide a defense for its insured. *Se. Wisconsin Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc*., 2007 WI App 185, ¶¶ 41-42, 304 Wis. 2d 637, 675-676, 738 N.W.2d 87, 106-107; *American Girl*, *supra*, at 2004 WI 2, ¶ 24, 268 Wis. 2d 32-33, 673 N.W.2d 73; *Acuity v. Soc'y Ins*., 2012 WI App 13, ¶ 14, 339 Wis. 2d 217, 226, 810 N.W.2d 812, 817. The coverage need only be arguable or fairly debatable. *Radke v. Fireman's Fund Ins. Co.*, 217 Wis.2d 39,44 577 N.W.2d 366 (Ct.App.1998); *Newhouse, supra*, 176 Wis.2d at 835, 501 N.W.2d 1.

Here, the Circuit Court made inconsistent decisions when it first decided that R&B had no coverage and then later decided that there could be a negligence claim against R&B of the sort that ought to have been covered by R&B's policy with West Bend. The Court of Appeals affirmed not by resolving this inconsistency, but rather by deciding that this case is governed by *Qualman v. Bruckmoser*, *supra*, which holds that insurance does not cover misrepresentation claims or pecuniary loss. In all due respect, when one considers the claim made against R&B, this case is not like *Qualman.*

The Circuit Court was able to conclude from the pleadings that there was an arguable claim that R&B committed some negligence in the process of installing supports to the basement walls, and that this negligence was a cause of the claimed damages, i.e., the seepage and drain tile plugging. Unfortunately, the Circuit Court came to this conclusion after it dismissed West Bend from the lawsuit.

This case may be challenging because the pleadings are unclear and because R&B denies any responsibility for causing the seepage and the drain tiles to plug up. However, R&B's insurance contract states that West Bend will defend R&B against "any suit seeking" the kind of damages that its policy covers. In the words of the courts, this means not a precise or even truthful claim, but rather a "arguable" or "fairly debatable" claim.

1. The Court of Appeals should not have concluded that *Qualman* was dispositive of the issue of whether any of the claims against R&B involved an "occurrence" or "property damage" because R&B is not being sued for misrepresentation.

The Court of Appeals decided that there could be no "occurrence" because the complaint was for misrepresentation and that there could be no "property damage" because the damages asserted by Smith were for pecuniary loss. The Court stated, at ¶16: "The pleadings alleged 'pecuniary damages' and requested '[rescission of] the sale, return [of] all moneys paid by the plaintiff in purchasing and

improving the property, plus moving costs and other expenses related to the purchase of the property.'" (This was *one of* Smith's alternative demands for relief against Anderson.)

In *Qualman,* the court considered whether a homeowner's insurance policy covered claims of misrepresentation on the sale of a home. The court decided that homeowners' liability insurance policies do not cover intentional misrepresentations or "pecuniary loss" as defined by the court. The "pecuniary loss" that the court referred to in *Qualman* was "the difference between the market value of the property [the house] at the time of purchase and the amount actually paid [for the house]."

However, no one is suing R&B for misrepresentation (or rescission of any contract). The arguable claim against R&B, brought into this suit by the third party complaint, is that some negligence on the part of R&B caused the seepage and clogging of the drain tile. The implication of the Court of Appeals' decision is that the original complaint dictates

whether a third-party complaint may state an insurable claim. That result is neither logical or fair. That would mean that if Anderson sued R&B in a separate action for damaging the drainage system of the house, West Bend would be required to defend, but not here, where R&B is sued by means of a third-party complaint.

The Court of Appeals stated, at ¶17, that the third-party complaint did not state a theory of liability against R&B, that there is no contention that R&B performed its work badly, or that R&B "caused the water exposure or the multiple issues that resulted therefrom." This is not how the Circuit Court interpreted the third-party complaint when it decided against dismissing R&B from the suit – a point that the Court of Appeals declined to discuss.

When R&B moved for summary judgment against Anderson, it submitted that as a matter of law, there is no claim for contribution or indemnification for intentional or strict liability misrepresentation – the causes of action pled by

Smith. *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 120-21, 479 N.W.2d 557, 564 (Ct. App. 1991); *Reda v. Sincaban*, 145 Wis. 2d 266, 271-72, 426 N.W.2d 100, 103-04 (Ct. App. 1988) [R.43,pp.5-7; R.65,App.,pp48-49][8] The Circuit Court did not disagree, but instead interpreted the pleadings to state a claim against R&B for negligently damaging the property, a claim separate from the misrepresentations claims made by Smith against Anderson.

To get to the result that the case only involved "pecuniary loss" the Court of Appeals disregarded the fact that the complaint made claims in the alternative.

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[8]Under Wisconsin law, a claim for contribution "is a separate and independent cause of action." *Johnson v. Heintz*, 73 Wis. 2d 286, 295, 243 N.W.2d 815, 822 (1976), citing *State Farm Mutual Automobile Insurance Co. v. Schara* (1972), 56 Wis.2d 262, 264—65, 201 N.W.2d 758. The elements of a claim for contribution in negligence situations are: "1. Both parties must be joint negligent wrongdoers; 2. they must have common liability because of such negligence to the same person; 3. one such party must have borne an unequal proportion of the common burden." *Johnson, supra*, citing *Farmers Mutual Automobile Insurance Co. v. Milwaukee Automobile Insurance Co.* (1959), 8 Wis.2d 512, 515, 99 N.W.2d 746, 748.

Smith did claim for rescission and diminished value, but also alleged in her complaint and amended complaint that in order to repair or correct the condition of the property she will need to replace the drain tile and install drain tile. [R.1, ¶7, App.,p.59] (The Amended Complaint added the allegation, at ¶5, that Anderson performed structural repair work without obtaining the required permits, and, at ¶7, that to repair or correct the condition of the property, Smith will need to obtain the proper permits. [R.16,p.2, App.,p.69]) In *Qualman*, the court noted that the plaintiffs only sought diminished value, and that they were not seeking to recover the cost of repairing damage caused by the defendant. *Qualman*, 163 Wis. 2d, at 366, 471 N.W.2d, at 285.

The courts have long held that "[t]he duty to defend exists if any one claim arguably falls within the policy coverage." *Se. Wisconsin Prof'l Baseball Park Dist*., *supra*, at 2007 WI App 185, ¶ 42, 304 Wis. 2d 676, 738 N.W.2d 107. Deciding that one form of claimed relief negates the other is contrary to this

principle. Therefore, given that there is a claim against R&B for property damage, it should not matter that there are alternative demands that are not "property damage" under West Bend's policy. In any event, it does not make sense to analyze this case from the standpoint of "rescission" or "diminished value" when R&B is not being sued for misrepresentation and diminished value damages are not a remedy even if it were proven that R&B accidentally caused the seepage and plugging of the drain tile.

Smith's complaint was not confined to pecuniary loss, i.e., the diminished value of her home. She claims that something caused the drain tile in her basement to clog with red ocher necessitating replacement of drain tile and installation of new drain tile. Anderson in turn claimed, however vaguely, that R&B worked on the house and was responsible for this occurrence. R&B was hired to add supports to the basement walls of the house and did not install or work on the 120 feet of drain tile under the basement

floor.[9] Although it appears far-fetched to believe that some negligence on the part of R&B in adding supports to the basement walls of the house caused the damage to the drain tile, this was the "arguable" negligence claim to which the Circuit Court referred when it denied R&B's motion for summary judgment.

The Court of Appeals stated, at ¶13: "we conclude that none of the allegations can be construed as 'occurrences' under the policy definition, even under the most liberal rules of pleading." This conclusion appears to be based solely on *Qualman* and the Court of Appeals' focus on Smith's claim of misrepresentation against Anderson. When the matter is viewed from the standpoint of the "arguable" claim that R&B's negligence caused damage to another component of the house, there clearly is an "occurrence."

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[9]R&B acknowledges installing four feet of drain tile to a new sump pump crock, but had nothing to do with 120 feet of drain tile following the perimeter of the house. [R.38,¶¶3-7; App.,p.163]

The policy states that a "continuous or repeated exposure to substantially the same general harmful conditions" is an "occurrence". In *American Girl, supra,* the occurrence was the settlement of a house resulting from poor soil compaction. In *Kalchthaler v. Keller Const. Co.*, 224 Wis. 2d 387, 397, 591 N.W.2d 169, 173 (Ct. App. 1999), the court recognized that there was insurance coverage for damages caused by water leaking through windows. In *Acuity v. Soc'y Ins*., 2012 WI App 13, ¶ 17, 339 Wis. 2d 217, 228, 810 N.W.2d 812, 818, the court recognized that soil erosion was an occurrence. As the court stated in *Acuity v. Soc'y Ins.*, 2012 WI App 13, ¶ 24, 339 Wis. 2d 217, 230, 810 N.W.2d 812, 819:

> The lessons of *American Girl, Glendenning's [Limestone & Ready–Mix Co. v. Reimer*, 2006 WI App 161, 295 Wis.2d 556, 721 N.W.2d 704], and *Kalchthaler* are that while faulty workmanship is not an "occurrence," faulty workmanship may cause an "occurrence." That is, faulty workmanship may cause an unintended event, such as soil settling in *American Girl*, the leaking windows in *Kalchthaler*, or, in this case, the soil erosion, and that event—the "occurrence"—may result in harm to other property.

Consequently, when viewed from the standpoint of the arguable claim that has kept R&B in this action, there is a claim of an "occurrence" that has led to property damage.

2. The Court of Appeals and the Circuit Court failed to properly apply the rule that an insurer should not be granted summary judgment declaring that there is no duty to defend if there is an arguable or fairly debatable claim which would be covered by insurance.

The arguable claim made against R&B in this case is that R&B's negligence in performing its work caused the seepage and the clogging of the drain tile made the subject of the plaintiff's complaint.

R&B's policy states that West Bend has a duty to defend R&B against any suit seeking to recover money from R&B for "property damage", except for "property damage" to which this insurance does not apply. R&B's policy is not unique. It uses standard language which has been addressed by the court in *American Girl*.

In *American Girl* an owner sued a contractor for damages resulting from the settlement of a house.

The contractor had followed the recommendations of a soils engineer in preparing the building site, and the advice given by the engineer was bad. In addressing the dispute over insurance coverage, the Wisconsin Supreme Court stated at 2004 WI 2, ¶ 27, 268 Wis. 2d 34, 673 N.W.2d 74:

> Standard CGL policies, including those at issue in this case, now cover "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' ... caused by an 'occurrence' that takes place in the 'coverage territory.'"

The court went on to state that whether the insuring agreement provides coverage depends upon whether there has been "property damage" resulting from an "occurrence" within the meaning of the CGL policy language. In deciding this question, the court stated at 2004 WI 2, ¶37, 268 Wis. 2d 38-39, 673 N.W.2d 75-76:

> ...."Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined in the policy. The dictionary definition of "accident" is: "an event or condition occurring by chance or arising from unknown or remote causes." Webster's Third New International Dictionary of the English

> Language 11 (2002). Black's Law Dictionary defines "accident" as follows: "The word'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." Black's Law Dictionary 15 (7th ed.1999).
>
> No one seriously contends that the property damage to the 94DC was anything but accidental (it was clearly not intentional), nor does anyone argue that it was anticipated by the parties. The damage to the 94DC occurred as a result of the continuous, substantial, and harmful settlement of the soil underneath the building. Lawson's inadequate site-preparation advice was a cause of this exposure to harm. Neither the cause nor the harm was intended, anticipated, or expected. We conclude that the circumstances of this claim fall within the policy's definition of "occurrence."

The insurance policy which West Bend issued to R&B has the same definition of "occurrence" which includes "continuous or repeated exposure to substantially the same general harmful conditions." In short, there is a claim that R&B caused an "occurrence", and consequently, property damage. The "occurrence" which R&B is alleged to have caused is the continuous and repeated exposure to water leaking into the basement and sediment flowing into

the drain tile. The property damage was done to the drain tile of the house, which were not a part of R&B's work in straightening the basement walls. The Circuit Court interpreted Anderson's third-party complaint against R&B as stating a claim that R&B negligently caused this occurrence and should pay for the damages caused by this occurrence, but this came after West Bend was granted summary judgment declaring that it had no duty to defend.

As noted above, the Court of Appeals based its decision on its determination that there was no "occurrence" or "property damage" and did not discuss the policy exclusion discussed in the briefs submitted to the Court of Appeals. The Circuit Court simply stated "In addition, there's that exclusion" and then paraphrased language of the policy which is sometimes referred to as the "business risk exclusion". Consequently, the record before the Circuit Court is not very clear. The Court of Appeals did not characterize the Circuit Court's statement as a ground for granting West Bend's motion, and instead,

describes the discussion as "West Bend's argument."[10] While R&B has presented arguments on why this exclusion does not apply to the facts of this case, for the reasons stated above, such arguments no longer appear to be material to this Appeal.

3. Where there is uncertainty as to whether an insured is being sued on a claim that ought to be defended by his insurer, a court should apply the "four corners" rule in a manner that does not frustrate the expectations of the insured.

As this Court has stated: "The four-corners rule 'ensure[s] that insurers do not frustrate the expectations of their insureds by [prematurely] resolving the coverage issue in their own favor[.]'" *Olson v. Farrar*, 2012 WI 3, ¶ 32, 338 Wis. 2d 215, 229-30, 809 N.W.2d 1,8, citing *Baumann v. Elliott*, 2005 WI App 186, ¶ 10, 286 Wis.2d 667, 704 N.W.2d 361. The rule should not be a means of penalizing a

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[10]At footnote 2, the Court of Appeals stated: "We also do not reach West Bend's argument that certain policy exclusions preclude a duty to defend because we have already concluded that the pleadings do not support such a duty. See *State v. Blalock*, 150 Wis.2d 688, 703, 442 N.W.2d 514 (Ct.App.1989) ("[C]ases should be decided on the narrowest possible ground....")."

party looking to his insurance company to provide him with a defense for the vagueness or shortcomings of pleadings over which he has no control.

When R&B moved for summary judgment (and judgment on the pleadings), the Circuit Court concluded that there could be a claim against R&B for negligence which caused leakage and damaged the drain tile. At that point in the case, the pleadings had not changed, but the parties had filed affidavits. The Circuit Court referred to a report attached to one of these affidavits when it denied R&B's motion for dismissal and interpreted the pleadings to state a potential claim that R&B negligently caused damage to the house. Referring to this engineering report the Circuit Court stated that there may be "some deviations which are significant in the design [prepared by 4th Dimension and followed by R&B] of the basement walls" which "would contribute to the condition of this faulty leaky basement..." [R.65,pp.16-17, App.,pp.50-51] The Circuit Court then stated, "I think there is a dispute of material fact and the

allocation of responsibility within or – negligence within which is allocated" and "I wonder whether R&B shares responsibility..." [R.65,pp.17-19, App.,pp.51-53]

This was not some new "arguable" claim that first surfaced at the summary judgment stage of the case. When West Bend moved for summary judgment on coverage, R&B raised the concern that the vague pleadings under consideration could "arguably" state the same claim that later prevented R&B's summary judgment [R.64,pp.17-18, App.,pp.23-24]:

> MR. MACHULAK: But there's a claim for contributions [sic], your Honor, and the claim [for] contribution is a negligence claim. That's all it is.

and

> MR. MACHULAK: And if you've got a claim for contribution against R&B, doesn't take much to argue that they're saying that R&B's contribution is the negligence claim. It's a contributory negligence claim. Somehow, something that R&B did caused all the drain tile to block up and the basement to leak....

Granting West Bend's motion for summary judgment, the Circuit Court stated:

> "I can't surmise the claim. The claim has to be pled." [R.64,p.17, App.,p.23]

R&B's description of the "arguable" claim was rejected when West Bend obtained its summary declaratory judgment, but got traction when R&B sought dismissal of the claim on its own motion for summary judgment.

The disparity in the Circuit Court's rulings could be explained by either the Court's changing its mind or the Court's taking into account information outside of the pleadings. If the former is true, then this is a case where the "fairly debatable" standard has not been properly applied. If the Circuit Court found merit to the claim it described at the summary judgment stage, it should have found that the claim was "arguable" or "fairly debatable" at the time of West Bend's motion. The same pleadings were before the Court on both occasions. If the Court reaches this conclusion, then R&B would ask the Court to reverse the Court of Appeals and Circuit Court for not

following the "arguable" or "fairly debatable" standard.

If, on the other hand, the third-party complaint does not state an "arguable" or "fairly debatable" claim against R&B within the meaning of the "four corners" rule, and the Circuit Court changed its mind because it later considered extrinsic evidence, R&B is unfairly prejudiced by the result, and the Court should fashion an appropriate remedy. Where a court cannot determine the nature of the claim from the pleadings of a third party, it would be more fair to require the insurer to continue to provide the insured with a defense until the doubt is resolved. This may require carving an exception to the "four corners" rule, but the result would be an improvement. The exception could be a requirement that a circuit court defer consideration of an insurer's motion for summary judgment declaring that there is no coverage until the court is satisfied there are not and will not be any claims that invoke the duty to defend.

The record in this case shows that for 26 years R&B has paid West Bend for insurance that obliges West Bend to defend R&B against claims made against it, regardless of the merits of such claims. [R.38,p.3 ¶9, App.,p.164] Using the "four corners" rule to its best advantage, West Bend sought a stay of proceedings and immediately moved for a final judgment declaring that its policy provided no coverage. Perhaps if West Bend had devoted the same amount of energy to seeking dismissal of the third-party complaint, the claims made against R&B would have been clarified before the sparring back and forth on what the pleadings meant under the "four corners" rule.

The Circuit Court cannot require West Bend or any insurer to file a motion against the claimant, or otherwise tell it how to pursue its case. However, the Circuit Court is certainly capable of denying a final judgment declaring no coverage which is unfairly prejudicial to the insured. This would leave it to the

insurer to choose the best way toward resolution of its involvement in the case.

4. Developing a rule that a judgment declaring no duty to defend is not a final judgment would serve the interests of justice.

One of the reasons that this case may be difficult to analyze from the standpoint of duty to defend is that R&B denies that it did anything wrong and/or is any way liable to Anderson, Smith, or anyone else. When the Circuit Court heard argument on West Bend's motion, R&B stated that it had to argue against itself to find some valid claim, but nonetheless explained how the pleadings arguably stated that "something that R&B did caused all the drain tile to block up and the basement to leak." [R.64,pp.16-18, App.,pp.22-24]

Because the duty to defend extends to claims which are devoid of merit, it should not matter that R&B denied the substance of the claim. However, where as here, a court disagrees with the insured's analysis of the pleadings, there is really nothing more to offer to show that the insurer has a duty to defend.

It is almost as if an insured who admits and submits evidence supporting a false claim against himself is in a better position (from the standpoint of having his defense covered by his insurance contract) than an insured who denies the claim.

After excusing West Bend from defending R&B on grounds that there was no claim against R&B arguably covered by its insurance, the Circuit Court denied R&B's own motion for summary judgment deciding that there could be a such a claim. This in itself was bad, but it also left R&B in a precarious position.

R&B tried to obtain a stay of the judgment in favor of West Bend until the Circuit Court heard R&B's motion for summary judgment, but did not obtain the stay. The Circuit Court entered final judgment against R&B notwithstanding R&B's pending motion. The Circuit Court signed and filed a final judgment in favor of West Bend before hearing R&B's motion for a stay.

R&B's motion for summary judgment against Anderson was also pending hearing when the Circuit Court signed the final judgment submitted by West Bend. West Bend then served a notice of entry of judgment to shorten R&B's time to appeal its judgment. R&B was at risk of losing its right to appeal as it tried to get its own motion for summary judgment heard by the Circuit Court. R&B managed to get its own motion for summary judgment heard on nearly the last day for filing its appeal of the judgment entered in favor of West Bend.

R&B tried to have the Court of Appeals simultaneously review the Circuit Court's granting of summary judgment to West Bend and its denial of summary judgment and judgment on the pleadings to R&B. R&B sought leave to file an interlocutory appeal of the Circuit Court's denial of R&B's motions, and in its petition argued that it had been prejudiced by inconsistent rulings. The Court of Appeals denied this petition, generally stating that "the petitioner

fails to satisfy the criteria for permissive appeal." [App.,pp.33-34]

R&B took these steps to avoid inconsistent rulings and to avoid the risk of forfeiting its contractual right to have West Bend provide it with a defense in the process. On the face of things, West Bend had a final judgment declaring that it was not obliged to provide R&B with a defense. [R.48, App.,pp.5-6] Was R&B obliged to appeal from this judgment to preserve any claim that West Bend was under a contractual duty to defend it? Or could it have tendered the suit a second time showing that circumstances changed in view of the Circuit Court's ruling on R&B's own motion for summary judgment? There do not appear to be established rules for this type of situation. Rather than risk having *res judicata* frustrate re-tendering the action, R&B proceeded on its appeal of West Bend's judgment.

In responding to R&B's petition for this review, West Bend argued that the issue of whether R&B could re-tender the defense is not properly before the

Court. R&B does not agree because the Court's clarification of the issue is tied into how and with what effect the "four corners" rule applies, it will direct further proceedings in this case, and it will be valuable precedent for others.

One way to address potential unfair consequences of the "four corners" rule is to carve exceptions to the rule. However, another way to address unfair consequences is to develop a rule that a judgment declaring no duty to defend is not a final judgment. Here, such a rule would have resurrected West Bend's duty to defend when the Circuit Court reversed itself as to the claim made R&B.

This case may be unusual because the event which reshaped it was the Circuit Court's changing its mind. However, there are other, more typical things that can happen during the progress of a case, such as discoveries, amendment of pleadings, that may bear on the duty to defend. Treating a declaratory judgment of no duty to defend made at the outset of a

case as a final judgment with *res judicata* effect is not fair or just to the insured.

By submitting this argument, R&B in no way concedes that the Circuit Court erred by granting West Bend summary judgment in the first place. To summarize R&B's primary and secondary requests:

(1) The Court should decide that properly applying the "four corners" rule, the pleadings do assert an "arguable" and "fairly debatable" claim that would be covered by West Bend's policy. In so doing, the Court should reinforce the premise that the "four corners" rule was designed to protect the insured, and not as a device for an insurer to avoid providing a defense for claims against its insured that likely have no merit.

(2) The Court should decide generally, that a summary judgment declaring that there is no duty to defend is not *res judicata* if and when an insured re-tenders the insured's defense at a later point in the case. The Court should decide specifically to this case, that the Circuit Court's articulation of the potential

claim against R&B when it denied R&B's own motion for summary judgment triggered a duty to defend on the part of West Bend.

CONCLUSION

For these reasons, the appellant R&B Construction, Inc., asks the Court to reverse the decisions of both the Circuit Court and the Court of Appeals in this matter.

Dated this 5th day of May, 2016.

Respectfully submitted,
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CERTIFICATION

I certify that this First Brief of Third-Party Defendant-Appellant-Petitioner R&B Construction, Inc. conforms to the rules contained in Wis. Stat. §§809.19(8)(b) and 809.62(4)(a) for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this First Brief of Third-Party Defendant-Appellant-Petitioner R&B Construction, Inc. is 9,398 words.

Dated this 5th day of May, 2016.

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CERTIFICATION OF COMPLIANCE WITH
RULE 809.19(12) AND (13)

I hereby certify that I have submitted an electronic copy of this First Brief of Third-Party Defendant-Appellant-Petitioner R&B Construction, Inc. and an Appendix, which comply with the requirements of §§ 8809.19(12) and (13). I further certify that the electronic Brief and Appendix submitted are identical in content and format to the printed form of the Brief and Appendix filed as of this date.

A copy of this certificate has been served with the paper copies of the Brief and Appendix filed with the Court and served on all opposing parties.

Dated this 5th day of May, 2016.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this First Brief of Third-Party Defendant-Appellant-Petitioner R&B Construction, Inc. is an Appendix that complies with § 809.19(2)(b), and contains: (1) the Decision of the Court of Appeals; (2) judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the Brief; (3) portions of the record essential to an understanding of the Brief; and (4) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b).

Dated this 5th day of May, 2016.

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